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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 456

FRED DAVIS,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Fred Davis, respectfully prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit entered on July 22, 1960. The petition for a rehearing was denied on September 1, 1960.

JUDGMENT AND OPINION OF COURT BELOW.

The Judgment of the District Court for the Northern District of Illinois, Eastern Division, was entered on November 30, 1959, sentencing the defendant to imprisonment for forty years. It is not reported, but appears at pages 221-222 of the Appendix certified to this Court by the Clerk of the Court of Appeals.

The Opinion of the Court of Appeals for the Seventh Circuit affirming said judgment was filed July 22, 1960. It appears in the Appendix hereto and in the certified copy of the Record. Rehearing was denied on September 1, 1960, and the order appears in the Appendix.

JURISDICTION.

The jurisdiction of this Court is invoked under 28 U.S. Code 1254(1).

QUESTIONS PRESENTED.

1. Has the effect to be given by the jury to the Court's charge been completely destroyed by a characterization of the proposed instructions by the trial Court, in the presence of the jury, as "rubber stamp instructions"; and has guilt been found by a jury according to the procedure and standards appropriate for criminal trials in the federal courts when the trial Court, in the presence of the jury, characterizes the instructions as "rubber stamp instructions"?

2. May a judgment of 20 years imprisonment stand when the evidence to sustain the sentence shows that the "sale" charged against the defendant was actually made by another person, and there is no evidence connecting the defendant with the transaction? Where the government argued and the Court below held that the woman who made the narcotic sale was "a representative and accommodation agent of defendant" when the only proof was that the woman was living with and sharing the apartment of the defendant, can a conviction of the defendant for a sale and a sentence of 20 years be sustained?

3. Can a conviction on 3 counts of a 4 count indictment and the imposition of a 40 years sentence be permitted to stand where the defendant was charged with making

3 separate sales of narcotics "not in pursuance of a written order from the said Dorothy Saunders, on a form issued in blank for that purpose by the Secretary of the Treasury of the United States" where it is conceded by the government and the Court below that there was not a word of evidence introduced about the order form, the Court below relying on a presumption which does not exist in the Statute involved?

4. Where the effect to be given by the jury to the instructions and the evidence has been emasculated by a direction to the jury to apply a presumption authorizing conviction, which presumption was wholly inapplicable to the charge in the indictment, has not the defendant been deprived of such substantial rights that this Court must notice the error thereof even though no exception was taken to the Court's action? Was not the error compounded by the failure of the Court to give any instructions concerning the necessary elements of the offense charged?

5. When it appears that the conviction rests upon completely erroneous directions to the jury upon basic issues, have the substantial rights of the defendant been so prejudiced that this Court may notice the error as "plain error"?

6. May a conviction and judgment of 20 years imprisonment stand on a charge of a sale of a narcotic drug in violation of Section 4705(a), Title 26, U.S.C., when there is a complete absence of proof to support the charge; no instructions are given the jury concerning the crime, and the jury is instructed erroneously that the crime charged is in violation of Section 174, Title 21, U.S.C., a different and wholly inapplicable statute from Section 4705(a), Title 26, U.S.C., the statute under which the indictment is laid?

And where it appears that the inapplicable statute read to the jury by the Court contains a provision authorizing "conviction unless the defendant explains the possession to the satisfaction of the jury" is the conviction so infected by prejudicial error as to require reversal?

7. Does the Fourth Amendment to the Constitution of the United States forbid the nighttime arrest of a person and the search of his person and premises, and use of the evidence obtained thereby, in the absence of a warrant of arrest or a search warrant and absent any showing of probable cause for the arrest?

8. Is a nighttime search and seizure in the home of the defendant lawful where it appears that at the time of the entry therein the defendant was absent, the entry was made upon the pretext of arresting another person who did not live in the premises and no search warrant or warrant of arrest for the defendant or such other person was in existence at the time of the entry? Was an exploratory search of the several rooms of defendant's home authorized upon the arrest of this other person immediately upon the entry of the agents to the room entered to make the arrest, the alleged purpose of the entry being accomplished?

9. Where the Court of Appeals has misapprehended the contentions of the defendant and the state of the record on the questions here presented, should not the Court exercise its jurisdiction to prevent injustice?

STATUTES AND RULES INVOLVED.

Fourth Amendment to the Constitution of the United States; Section 174, Title 21, United States Code Annotated; Section 4705(a), Title 26, United States Code Annotated; Federal Rules of Criminal Procedure, Rule 41(e);

Federal Rules of Criminal Procedure, Rule 52(b); Section 7607, Title 26, United States Code Annotated; Chapter 38, Sec. 657, Ill. Rev. Stat. 1959.

These provisions appear in the Appendix hereto.

STATEMENT OF THE CASE.

Petitioner was convicted by a jury upon all counts of an indictment. Three counts charged him with the sale of narcotics, not in pursuance of a written order from the buyer, one Dorothy Saunders, in violation of Section 4705(a), Title 26, U.S.C. The fourth count charged him with receiving and concealing a narcotic drug after unlawful importation in violation of Section 174, Title 21, U.S.C.

Petitioner was sentenced to imprisonment for 40 years as follows: 20 years on Count 1, 20 years on Count 2 to run consecutively to the sentence on Count 1; 20 years on each of Counts 3 and 4 to run concurrently with each other and with the sentences on Counts 1 and 2 (A. 2).

Prior to trial the defendant filed his motion to suppress the evidence (A. 7-11); hearing was had thereon (A. 11-45), and the motion was denied (A. 59).

The errors relied on relate to the denial of the Motion to Suppress the Evidence, the insufficiency of evidence as to the alleged sales counts and the possession count, the erroneous instructions, and the characterization of the instructions in the presence of the jury as "rubber stamp" instructions.

STATEMENT OF FACTS IN CONNECTION WITH THE MOTION TO SUPPRESS THE EVIDENCE.

The salient facts produced on the hearing to suppress the evidence are as follows: the defendant testified he was arrested in his grocery store at 10:00 o'clock at night and that the agents who arrested him had no warrant. They took him to his apartment, some blocks away, where he saw that the door was broken away. He saw officers in the process of searching his home when he arrived. He did not know Dorothy Saunders, who was then in the apartment. Sharing the apartment with him was a Bernice Toomer, who lived there with her two children and was paying him rent (A. 17).

The government stipulated that no agent had a search warrant or arrest warrant and none existed for the arrest of the defendant or the search of his apartment at 4540 Drexel Boulevard, Chicago, Illinois (A. 28).

For the government, narcotic agent James Bailey testified that on three separate occasions he gave money to Dorothy Saunders. He drove her to the vicinity of 46th and Drexel Streets where she was observed going into the apartment building at 4540 Drexel, which contained at least six apartments; and on one occasion she was observed going into the first floor apartment of the defendant. On each of the three occasions she returned from the building and gave small packages of narcotics to Bailey (A. 20-23). On the last occasion, when Dorothy Saunders left agent Bailey, she was seen going into the first floor apartment at 4540 Drexel Boulevard. It was night-time. After she entered the apartment, other agents forcibly broke into the apartment and found Saunders and Bernice Toomer in the apartment. Toomer was sitting on a bed in her bedroom and under the bed covers were found nine

packets of narcotics and $140.00 being the money which Bailey had earlier given to Saunders (A. 23-25). Agent Bailey admitted that he did not see either the defendant or Bernice Toomer have any transaction with Dorothy Saunders on any of the dates in question. None of the agents who had raided the apartment were the agents who arrested Davis in his store (A. 27).

Narcotic agent Heisig testified for the government that he saw Dorothy Saunders enter the apartment house at 4540 Drexel Boulevard at about 7:45 P.M. on February 20. An insurance agent knocked on the door of the apartment entered by Dorothy Saunders and when Saunders came to the door the witness advised her he was a narcotic agent and that she was under arrest. She slammed the door and they forcibly went into the apartment where they arrested Dorothy Saunders and Bernice Toomer (A. 30). Before he entered the apartment building he was informed by agent Bailey of Bailey's contact with Dorothy Saunders. Agents Singer and Halasz, were "dispatched "from that area to the area of Davis' store" (A. 31).

On cross-examination, agent Heisig said that the violations for which the agents were going to arrest her were for those she had committed on February 11, 15 and 18 (A. 32). He never saw the defendant in the company of Dorothy Saunders (A. 34).

Narcotic agent Lipshutz testified for the government that he observed Dorothy Saunders with agent Bailey on the occasions prior to February 20, 1959 (A. 37-39). On one occasion he noticed Dorothy Saunders admitted to the apartment of Fred Davis (A. 40). On the night of the breaking in of the apartment he saw Dorothy Saunders leaving agent Bailey's car after which agent Heisig told the witness that "everything was under control" (A. 40).

On cross-examination, he testified he never saw the defendant in Dorothy Saunders' company (A. 41). When he entered Davis' apartment other agents were already there. (A. 43).

STATEMENT OF FACTS PRODUCED AT THE TRIAL IN CHIEF.

The salient facts at the trial are as follows: narcotic agent Bailey testified he met Dorothy Saunders on February 11, 16 and 18, 1959, and gave her $75.00 on two occasions and $140.00 on one occasion. On each occasion she entered a drugstore and then entered his car. He drove her to 46th and Drexel Streets where she left him. She returned about fifteen minutes later and handed him a manila envelope, which later proved to be narcotics (A. 63-75). On February 20, 1959, he again talked to her, she again went to a drugstore and he again drove her to 46th and Drexel. He gave her $140.00. After she left him he talked with two other agents and then he went to the first floor apartment at 4540 Drexel (A. 75-76). When he entered the apartment he saw Dorothy Saunders sitting at a table. He went to the rear bedroom and found Bernice Toomer sitting on a bed. Present were agents Morris, Singer, Valentine, Heisig and Lipshutz. When he threw back the covers on the bed on which Bernice Toomer was sitting, he found the $140.00 he had previously given to Saunders and nine small packets of manila envelopes (A. 76-77). Later, other agents brought Davis to the apartment (A. 78). The witness asked Davis whether a coat found in a back bedroom was his and Davis answered "everything back there is mine" (A. 78-79). The apartment in which the search was conducted was a six room apartment containing a living room, dining room, kitchen, two bedrooms and a small room. None of these rooms was locked and

anyone in the apartment could have had access to any of the rooms (A. 93).

Dorothy Saunders testified for the government that she was a narcotic addict and a prostitute and that she knew Davis for over two years (A. 96). After she talked with agent Bailey on February 11, 1959, she talked on the telephone with Fred Davis (A. 96). Bernice Toomer was Davis' girl friend and they lived together at 4540 Drexel. She then went to Davis' apartment and gave him the $75.00 which Bailey had previously given her. Davis gave her a half ounce of heroin (A. 97-98).

On February 16, she again saw agent Bailey and she again made a phone call. She spoke to Bernice Toomer. Bailey drove her to the house, which she entered alone, and she had a conversation with Bernice Toomer (A. 99-100). She gave Bernice Toomer $75.00 and Bernice Toomer gave her a package which she later gave to Bailey (A. 100-1). This was the proof on Count 2.

On February 18, 1959, she saw agent Bailey, made a phone call and talked to Fred Davis on the phone. She was then driven to Davis' apartment house, she entered Davis' apartment, and she gave Davis $140.00 which Bailey had previously given to her. Davis gave her a package which she turned over to Bailey (A. 101-2).

On February 20, 1959, she met Bailey, had a telephone conversation with Bernice Toomer, received $140.00 from him, later entered the apartment and only Bernice Toomer was present (A. 103).

On cross-examination, she testified that on February 11, she asked over the telephone for Umpty because she did not know Davis' name (A. 110).

On February 16, 1959, she spoke to only Bernice Toomer on the telephone and saw only Toomer in the apartment and had a transaction only with her. (A. 115-116). On this date she neither saw Fred Davis nor did she give him any money. Neither did Fred Davis give her any narcotics on February 16 (A. 116). She gave Bernice Toomer $91.00 although agent Bailey had given her only $75.00. The 16 extra dollars was for some drugs for herself which she received from Toomer.

On February 20, 1959, at about 7:00 o'clock at night, she spoke only to Bernice Toomer on the telephone (A. 120-1). After she received $140.00 from Bailey, she went inside the apartment and gave Bernice Toomer the $140.00. A knock came at the door and when she asked "who is it" and she turned to go back to the bedroom, the whole door crashed in (A. 121). Davis was not in the apartment. When she was asked by the agent if she knew Fred Davis, she denied knowing him (A. 121).

The third and last government witness was narcotic agent Lipshutz who testified that on February 20 he was admitted to Davis' apartment by agent Heisig. He, together with other agents, searched the apartment (A. 133-7) and found money that had been previously marked. (A. 142-3).

REASONS FOR GRANTING THE WRIT.

I.

The Court of Appeals has so far sanctioned a departure from the procedure and standards appropriate for criminal trials in the Federal Courts as to call for an exercise of this Court's supervision

1. The Court of Appeals failed to hold that the effect to be given by the jury to the Court's instructions was

completely destroyed by the comment by the Court in the presence of the jury that "I will cover the indictment, the credibility and the reasonable doubt, and all of that. All I want from each side is anything special that you might have. *I will add the rubber stamp instructions.*" (A. 139).

The Court of Appeals completely ignored this assignment in its Opinion. "The influence of trial Judge on the jury is necessarily and properly of great weight . . . and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, the judge's last word is apt to be the decisive word." *Bollenbach* v. *U.S.*, 326 U.S. 607, 612.

Undoubtedly the jury concluded that the Court's instructions, being "rubber stamp" instructions, did not carry effect in their deliberations and were thus left without proper guidance as to the fundamental requirements of the law in a difficult and confused case.

2. The Court of Appeals failed to hold as "plain error" instructions to the jury which advised the jury erroneously that Counts I, II and III of the indictment which charged a sale of narcotics "not in pursuance of a written order," in violation of Section 4705(a) of Title 26, U.S.C., were brought under Section 174, Title 21, U.S.C. That section was erroneously read to the jury in the Court's charge, as follows:

> "Counts I, II and III allege a violation of a United States Statute, which reads:
>
> 'Whoever fraudulently or knowingly . . . receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug, after being imported or brought in, knowing the same to have been imported contrary to law . . . shall be . . . punished.'

"The Statute further provides:

'Whenever on trial for a violation of this section, the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.'" (A. 198).

But this is not the section of the law involved in a sale. Thus, the jury was directed to apply a presumption and authorized to convict the defendant of a charge of "sale" under Section 4705(a), Title 26, upon a past or present possession of a narcotic drug and failure of the defendant to explain such possession to the satisfaction of the jury. This Court has stated that a conviction ought not to rest on an equivocal direction to the jury on a basic issue. *Bollenbach* v. *U.S.*, 326 U.S. 607, 613. This charge went far beyond being equivocal. It is plainly erroneous and could only have completely confused and misled the jury.

It is important to note here that the charges in Counts I, II and III were for a sale of narcotics not in pursuance of a written order form issued for that purpose. The jury was not instructed in the slightest in this connection. It may be had the jury been so instructed by the court, as to the appropriate law in question under Section 4705(a), Title 26, U.S. Code they would have returned a not guilty verdict. For it is a sale without an order form which is the proof necessary to be produced by the government, and not merely possession, as the court erroneously explained to the jury. Because the jury was left without any guide with respect to Counts I, II and III, it was left without any instruction at all on how to apply the facts. *The facts were not there*, because the government completely failed to show either by proof or evidentiary

inference that the alleged sales were made "not in pursuance of a written order form from the said Dorothy Saunders, on a form issued in blank for that purpose by the Secretary of the Treasury of the United States".

The holding of the Seventh Circuit Court of Appeals is in direct conflict with the holding of the Court of Appeals for the District of Columbia. In *Kelly* v. *United States*, 275 F. 2d 10 (1960), too, the defendant was convicted for selling narcotics not in pursuance of an order form in violation of 26 U.S.C. Section 4705(a). The Court said (p. 11), that as to the first count, selling narcotics, the government offered evidence that the appellant was asked by a plain clothes policeman to purchase narcotics for him; that he gave her money; that she went to a house where a seller of drugs was said to live, and that she later handed the officer a packet containing drugs. (The identical factual situation here). "With the case in that posture, *it became essential that the jury be instructed as to the elements necessary to establish a sale by the appellant.* No such instruction was given. On that ground and without reaching other points raised, we hold that the court erred in failing to grant appellant's timely motion for a new trial." (Emphasis added).

In the instant case the trial court not only did not give an instruction advising the jury of the necessary elements to establish a sale, but gave the jury a wholly misleading and erroneous set of instructions which did not apply to the charge of sale.

Not only should this Court's supervisory function be exercised to insure the propriety of a trial as we know it under our adversarial system under a proper set of jury instructions, but this Court should grant certiorari where two separate Circuits are in direct conflict on the exact point of law.

We urge that under the circumstances of this case the errors concerning these instructions created such a substantial miscarriage of justice that this Court should apply the "plain error" provisions of Rule 52(b) Federal Rules of Criminal Procedure.

It is impossible to conceive that a proper verdict could be reached on the thoroughly erroneous and confusing instructions given the jury.

II.

1. The Court of Appeals failed to hold that there was a complete absence of proof to support the conviction under Counts I, II and III. These counts charge a sale of drugs to Dorothy Saunders "not in pursuance of a written order form from the said Dorothy Saunders, on a form issued in blank for that purpose by the Secretary of the Treasury" (A. 3-4). There is not a word of evidence in the whole of the Record that touches upon the proof with respect to whether or not Saunders had a written form in blank for that purpose. The government has conceded, and the Court of Appeals below has noted, there is no proof on this score.

The government relied upon, and the court below followed, the holding in *Chin Gum* v. *U.S.*, 1 Cir., 1945, 149 F. 2d 575, to the effect that it is not incumbent on the government to prove that the seller of narcotics, charged under Title 26, U.S.C. 4705(a), did so without a written order on the form prescribed. The court below held that *Blockburger* v. *United States*, 284 U.S. 299; *Gore* v. *United States*, 357 U.S. 386 and *Harris* v. *United States*, 359 U.S. 19 do not apply. In these three cases the holdings by this Court were to the effect that a charge under the section of the narcotic laws alleging sale required actual proof that the sale was made not in pursuance of an order form.

The Court of Appeals' ruling substitutes its holding for the decisions of this Court.

The latest expression on this subject from this Court was in March, 1959 in *Harris* v. *United States*, 359 U.S. 19. There the defendant was charged with (1) the purchase of narcotics from an unstamped package contrary to 26 U.S.C. 4704(a) and (2) with receiving and concealing the same drug knowing it to have been unlawfully imported contrary to 21 U.S.C. 174. The defendant was sentenced to cumulative sentences. Your Honors explained that your decision in *Gore* controlled, for it was said (p. 22):

> "The direct proof in *Gore* was of a sale of heroin without a written order charged in one of the three counts upon which the consecutive sentences were based. Resort to the statutory presumption was made to establish *the other two counts* on which those sentences were assessed". (Emphasis added).

This Court further said, in *Harris*, that to take advantage of the presumption of Sec. 174, Title 21, it is necessary only to prove possession by direct evidence; whereas to take advantage of the presumption of Sec. 4704(a), Title 26, U.S.C., *it is necessary to prove by direct evidence that the narcotic was unstamped as well as that it was in the defendant's possession*. So also here, to prove a sale under Sec. 4705(a), Title 26, U.S.C., it was necessary to prove *that such was made not in pursuance of a written order form*. It is conceded by the government that no such proof was made under Counts I, II and III.

For the court below to ignore the definite holdings by this Court in three separate cases decided in 1932 (*Blockburger*), 1958 (*Gore*), and 1959 (*Harris*) calls for this Court's exercise of supervisory control over the Appellate Courts; and accordingly, this Court ought to exercise its jurisdiction.

III.

1. The Court of Appeals failed to hold that there is no proof that the defendant sold narcotics as charged in Count II of the indictment. Count II charged Fred Davis with selling narcotics to Dorothy Saunders on February 16, 1959 (A. 4). In its argument to the Court of Appeals the government conceded that Davis did not make the sale to Saunders. One, Bernice Toomer, made the sale (A. 99-100). Saunders testified that Miss Toomer was living with Davis in the apartment. On that basis, the government argued that she was the defendant's "amatory amanuensis". The Court of Appeals held, therefore, without more, that "the jury would be justified in concluding that Mrs. Saunders deal with Mrs. Toomer solely as a representative and accommodation agent of defendant". (Opinion in Appendix herein.) There is no justification for such conclusion of guilt by agency, because the proof was totally absent.

The defendant was sentenced to twenty years on Count II, which sentence is made consecutive to the twenty years he was sentenced on Count I. Such punishment for speculative conclusions, which speculations can only be governmental flights of fancy, ought not to be sustained by this Court. This Court should take jurisdiction to express its opinion in this connection and correct an injustice.

IV.

1. The Court of Appeals failed to hold that the arrest and search of the defendant was illegal and failed to hold that the search of his apartment was a violation of the Fourth Amendment to the Constitution.

The Court of Appeals has sanctioned the breaking down of a door in the night-time, an exploratory search and

seizure in the home of the defendant without a search warrant, or warrant of arrest, and in the absence of the defendant. Such action is in violation of the Fourth Amendment to the Constitution and Rule 41 of the Federal Rules of Criminal Procedure. Such decision is in conflict with the decisions of this Court in *Jones* v. *United States*, 357 U.S. 493; *Giordenello* v. *United States*, 357 U.S. 480; *Agnello* v. *United States*, 269 U.S. 20; *Johnson* v. *United States*, 333 U.S. 10 and *McDonald* v. *United States*, 335 U.S. 451.

The night-time forcible entry and search of the apartment of the defendant was made upon the pretext of an arrest of another person. There was no great emergency. No suspect was fleeing or likely to take flight. The search was of premises, not of a movable vehicle. There were no "exceptional circumstances" and no showing was made that the exigencies of the situation should excuse the absence of a warrant. If Saunders was really the agent's quarry, they had her in custody immediately on entering the apartment. The entry was not to make an arrest but in reality for the purpose of conducting a general exploratory search. *Go-Bart Importing Co.* v. *United States*, 282 U. S. 344; *United States* v. *Lefkowitz*, 285 U. S. 452.

We question even whether the officers could have obtained a search warrant for the apartment had they presented the facts they testified to in an affidavit and presented them to a judge or to a United States Commissioner in accordance with Rule 41(c) F.R.C.P. A night-time search, even with a warrant, requires "positive statements". But in such affidavit, had the agents attempted to secure one, they could only testify with positiveness that Dorothy Saunders sold narcotics to Agent Bailey on three separate occasions; that on each of these occasions she left a tavern, went to a drug-store, went to an apart-

ment building containing six apartments and on one of these occasions entered the apartment of Fred Davis. These facts—which were all the government had—and all the government produced at the hearing on the motion to suppress the evidence—would hardly justify a search warrant to issue for the search of an apartment in the daytime, much less to authorize a search of a house in the night. The government's theory was that the agents had probable cause to suspect that Fred Davis was the supplier of Dorothy Saunders (A. 36); but there were no *facts* upon which the government's theory would be justified.

In *Jones* v. *United States*, 357 U.S. 493, this Court strongly condemned a search such as here, saying (pp. 497-8):

> "It is a settled doctrine that probable cause for belief that certain articles subject to seizure are in a dwelling cannot of itself justify a search without a warrant. . . . The decisions of this Court have time and again unscored the essential purposes of the Fourth Amendment to shield a citizen from unwarranted intrusion into his privacy".

In addition, it was the government's theory that "Dorothy Saunders was committing a crime on the other side of that door, and when that door slammed in their faces they had good cause to believe there were narcotics there, and they had good cause to go into that apartment even though they did not have a warrant of arrest or warrant of search" (A. 36).

From this second theory of the government by which it seeks to justify the illegal entry and search, we assume that the government is relying upon their right lawfully to arrest Dorothy Saunders, and predicated thereupon, to make a search of the premises incident to her lawful

arrest. But there are two objections to this theory of the government. First: it is obvious from the state of the Record that the arrest on February 20, 1960, was an arrest of purposeful convenience to the agents. They could have arrested her at any time on February 11, 16 and 18 after she consummated her sale of narcotics to Bailey. They did not. They could have arrested Dorothy Saunders even on February 20, because she was with Agent Bailey for quite some time; and other agents saw her enter the apartment building and were in and about the apartment building. It is obvious then that the purpose for picking that particular time and place was not for the purpose of arresting Dorothy Saunders but to make an exploratory search of the premises. An "accommodation" arrest was condemned in *McDonald* v. *United States*, 335 U.S. 451, 456, 93 L.ed. 153, 158, wherein the court said:

> "No reason, except inconvenience of the officers and delay in preparing papers and getting before a magistrate, appears for the failure to seek a search warrant. But those reasons are no justification for bypassing the constitutional requirement, as we held in *Johnson* v. *United States, supra* (333 U.S. p. 15, 92 L.ed. 441, 68 S.Ct. 367)."

A similar situation obtained in *Accarino* v. *United States*, D. C. Cir., 179 F. 2d 456, where the police had trailed a man "picking up numbers" (a form of organized gambling). They observed him making 10 or 12 stops during the day. They observed him on those other days on which he traveled over the same route. On four of these days, an under-cover man for the police placed number bets with an attendant at one of the places where the appellant stopped each day. On another day one of the officers looked into appellant's car while he was at one of

his stops and observed several number slips, one of which he took. On the day in question, he was tailed and entered an apartment house. When the appellant entered his apartment, the police knocked on the door and yelled "police". The door not being opened, the officers broke it down. They seized papers, money and placed him under arrest.

The government argued there, as here, that the evidence seized should be admitted because it was seized as an incident to a lawful arrest. There, as here, the government argued that the officers had probable cause to believe that the appellant was committing a felony and that, therefore, they had a right to arrest him without a warrant; and that having a right to arrest they had a right to use whatever force was necessary to effectuate the arrest, and that breaking of the door was necessary to make the arrest. The Second Circuit held that *McDonald* v. *United States*, 335 U.S. 451, was the short answer in opposition to the government's contention. It was said in *Accarino* (p. 464):

> "The right to break open a door to make an arrest requires something more than the mere right to arrest. If nothing additional were required, a man's right of privacy in his home would be no more than his rights on the street; and the right to arrest without a warrant would be precisely the same as the right to arrest with a warrant. The law is other. . . . There was, and had been, plenty of opportunity for the officers to secure warrants, both of arrest and of search. Moreover, they had ample time and opportunity to move the arrest on the street before the suspect entered his home. . . . It would appear that the officers deliberately let him get to his own front door before they attempted to approach. If thereafter there was a semblance of emergency requiring the breaking of the door, it was created by the officers."

The Court of Appeals has so far departed from the many unequivocal decisions of this Court, as cited above, that this Court should assume jurisdiction.

V.

1. The Court of Appeals has approved an unlawful arrest of the defendant without warrant or any evidence of probable cause and approved an unlawful search of his person and business premises pursuant to said arrest and the use of evidence thereby obtained, contrary to the provisions of the Fourth Amendment to the Constitution, the Statutes of the State of Illinois governing arrests without warrant, and the decisions of this Court.

No showing was made by the government on the hearing of the motion to suppress the evidence, or on the trial thereafter even to attempt to justify the arrest and search of the defendant at his store several miles removed from his home. The arresting agents were not called as witnesses and there was no evidence offered to establish "probable cause" for this arrest and search of his person. The agents could not have procured a warrant even had they proceeded lawfully in accordance with the requirements of Rules 3 and 4 of the Federal Rules of Criminal Procedure. See *Giordenello* v. *United States*, 357 U.S. 480.

The Court of Appeals gratuitously states in its opinion: "It is clear from the chain of evidence adduced at the hearing on the motion to suppress that the agents who arrested Mrs. Saunders and the defendant all had reasonable grounds from their own direct observation *or from information available* from fellow agents to believe that both Mrs. Saunders and the defendant had committed a violation of the laws relating to narcotic drugs". (Appendix herein. Emphasis added).

The Record discloses only that the agents Singer and Halasz were dispatched from the area to defendant's store (A. 31). The agents who arrested Mrs. Saunders and who searched the apartment did not arrest the defendant. The Record is silent as to information, if any, possessed by Singer and Halasz who arrested the defendant. They were not called as witnesses.

Narcotics officers have the right to make arrests without warrant only "where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation". (Sec. 7607, Title 26, U.S.C.) No showing was made or attempted to be made that the persons making the arrest were authorized to do so under this Statute.

The Illinois Statute covering arrests without warrant, so far as pertinent here, provides, "by an officer, when criminal offense has in fact been committed and he has reasonable ground for believing that the person to be arrested has committed it. (Sec. 657, Ch. 38, Ill. Rev. Stat., 1959). No authority existed or was shown for the arrest under this Statute. See *United States* v. *Di Re*, 332 U.S. 581 at 590.

Accordingly, the lower court's ruling is in direct conflict with the above cited cases.

CONCLUSION.

For all of the foregoing reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

GEORGE F. CALLAGHAN and
JULIUS LUCIUS ECHELES,
Attorneys for Petitioner.

APPENDIX A.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1959—APRIL SESSION, 1960

No. 12870

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
v.
FRED DAVIS,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

July 22, 1960

Before HASTINGS, *Chief Judge*, and SCHNACKENBERG and KNOCH, *Circuit Judges*.

KNOCH, *Circuit Judge*. A jury found defendant, Fred Davis, guilty on four counts of an indictment, charging Fred Davis with three unlawful sales of narcotics to Dorothy Saunders in violation of Section 4705(a), Internal Revenue Code of 1954, as amended by the Narcotic Control Act of 1956, and with knowing and unlawful receipt, concealment, etc. after unlawful importation, of narcotics, in violation of Section 174, Title 21, U.S.C., as amended by the Narcotic Control Act of 1956.

Defendant was sentenced to twenty years' imprisonment on the first and second counts, to run consecutively, and to

twenty years on the third and fourth counts, to run concurrently with the sentence on the first two counts, or to forty years in all.

The purported errors on which defendant relies in his appeal to this Court concern denial of petition to suppress evidence and motion for judgment of acquittal; and instructions to the jury.

In connection with the petition to suppress evidence, defendant testified that he had been arrested in his store without arrest or search warrant; that his person and the store had been searched; that a sum of money, part of which belonged to his partner, had been taken from him; that he was then taken to his apartment on the first floor at 4540 S. Drexel Boulevard, several miles away, where he found that the door had been broken in, that present in the apartment were several officers who had no search warrant, Dorothy Saunders, whom he said he did not then know, and his paying guest Bernice Toomer; that he pointed out his own bedroom and acknowledged ownership of clothing in the apartment belonging to him, but couldn't say whether currency shown him by one of the officers was or was not his money.

It was stipulated that no arrest or search warrant was used.

Narcotics Agent James Bailey testified that on February 11, 1959, he had told Dorothy Saunders that he wished to buy narcotics for $75 and that she said she would take care of him. On her instruction Agent Bailey had driven to 43rd Street and Drexel Boulevard in Chicago, where Mrs. Saunders went into a drug store. When she came out, she said, "O.K., he is there" and directed Bailey to drive to 46th Street, where she again got out and walked north on Drexel Boulevard. Bailey testified that he did not see where she went, but that other agents were in the vicinity.

Agent Irving Lipshutz testified that on February 11, 1959, he saw Mrs. Saunders enter an automobile with

Bailey; that he followed and saw her first enter what appeared to be a liquor store at 43rd Street and Drexel Boulevard, come out and re-enter the automobile, and then later, enter a gangway to the building at 4540 Drexel Boulevard from which she returned, in about five to ten minutes, to Bailey. He could not ascertain which apartment in the building she had entered.

Bailey testified that when Mrs. Saunders returned to him, she handed him a brown manila envelope. Bailey gave her $75. The serial numbers of the bills had been recorded. He field tested the contents of the envelope for narcotics and noted a positive reaction. He later saw the chemist's report showing that the substance he received contained heroin.

When asked about February 17, 1959*, Bailey testified further that he had told Mrs. Saunders he wanted to do the same thing, that again he drove to 43rd Street and Drexel Boulevard where Mrs. Saunders entered the drug store, came out and said "he was there" and to drive to 46th Street, which he did. He gave her $75. She walked north on Drexel.

When asked about February 16, 1959, Agent Lipshutz testified that he again followed Dorothy Saunders and Bailey from 35th and Prairie, saw Mrs. Saunders enter a liquor store, come out in a few minutes, and then enter the front entrance of the building at 4540 S. Drexel Boulevard. He was dressed as a taxicab driver and, following Mrs. Saunders into the entryway and up the stairs of the building at 4540 S. Drexel Boulevard, he saw her knock at defendant's apartment door and be admitted.

Bailey testified that when Mrs. Saunders returned to the car on February 16th, she gave him a brown manila envelope containing a white powder, which, on testing, proved to contain heroin.

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* Apparently this was an error, and it was meant to refer to February 16th. This and one or two other misstatements of date in the transcript were evidently accepted by all parties as mere slips of the tongue, as none of the briefs comment on these discrepancies in date. The indictment charges sales as follows: Count I on February 11, 1959, Count II on February 16, 1959, and Count III on February 18, 1959.

Bailey described a similar transaction on February 18th, with reference to $140 worth of heroin. On February 20th, Bailey testified, he again met Mrs. Saunders and went through the same routine. On cross-examination, he added that on this occasion she did not say "he is there" on her return from the drug store.

Agent Theodore Heisig testified that on February 20th, he knew Bailey planned to contact Mrs. Saunders and that, at about 7:30 P.M., in company with Agents Gabrys and Morris, he observed Mrs. Saunders enter the apartment house at 4540 Drexel Boulevard, and go up to the first floor apartment, knock on the door, say, "This is Dorothy," and be admitted. Agent Lipshutz, who also observed Mrs. Saunders walk toward the building, put the time at 7:00 P.M. Agent Bailey on cross-examination testified that it was about 8:15 P.M. when he met Dorothy Saunders on February 20, 1959. Defendant stresses the fact that it was already dark at the time. Heisig testified further that he was about to knock on that same door when an unidentified man came down the stairs and knocked on the door. Mrs. Saunders came to the door. Heisig told her he was a Federal Narcotics Agent and that she was under arrest. She slammed the door. The agents forcibly entered the apartment. They found Dorothy Saunders in the living room and made her arrest effective. Later Bernice Toomer who was also in the apartment was arrested.

When Mrs. Saunders had left him, Bailey had not waited for her return but had gone to defendant's apartment. There he had found Agents Morris, Heisig and Lipshutz, Dorothy Saunders, and Bernice Toomer. On cross-examination Bailey said that Agents Valentine, Singer, Gabrys and Morris came into the apartment after him. Bailey testified further that Mrs. Saunders told him Mrs. Toomer had taken the heroin. Under the covers of the bed on which Mrs. Toomer had just been sitting, Bailey found $140 and nine packages which proved to contain heroin.

The serial numbers of the currency tallied with his list of bills given to Mrs. Saunders. After the seizure of the heroin, Agents Singer and Halasz were sent to defendant's store. They shortly returned with defendant, who admitted that the apartment was his. Bailey testified further that he checked money taken from defendant's person, and from clothing in defendant's apartment which belonged to defendant, and found $30 which tallied with his list of bills given to Mrs. Saunders. All of the agents who testified stated that they knew of the prior transactions described by Bailey.

Defendant argues that breaking down the door of his apartment in the nighttime without a search warrant was illegal; that the arrest of defendant without a search warrant was likewise illegal; that the arresting officers had no probable cause for an honest belief that defendant was committing a crime; and that the evidence seized in his apartment and from the person of defendant should have been suppressed on his motion to that effect seasonably made in advance of trial.

It is defendant's position that the agents forcibly entered defendant's apartment not to arrest Mrs. Saunders, but for the sole purpose of making an illegal exploratory search of defendant's apartment. Defendant argues that Agents Heisig and Gabrys had no probable cause to believe a crime was being committed in defendant's apartment by anyone, let alone by the defendant, and that Mrs. Saunders' arrest could have been effected at any time on February 11, 16, 18, or on February 20, before she entered defendant's apartment; and that, in any case, a warrant could have been secured because Mrs. Saunders was not fleeing apprehension and was, in fact, under adequate surveillance to prevent her escape. Besides, defendant argues, Mrs. Saunders could have been arrested in the living room, and there was no basis for search of other parts of the apartment.

As to the agents who arrested defendant in his store, defendant contends that even if they knew narcotics had

been found in his apartment, they also must have known that Mrs. Toomer was in the apartment at the time and that the narcotics were found in the bed on which she had been sitting, and that they could not therefore have had probable cause for his arrest.

The government relies on Title 26, U.S.C. Section 7607, which authorizes Narcotics Agents to

> ". . . make arrests without warrant for violations of any law of the United States relating to narcotic drugs . . . where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation."

It is clear from the chain of evidence adduced at the hearing on the motion to suppress that the agents who arrested Mrs. Saunders and defendant all had reasonable grounds, from their own direct observation or from information available from fellow agents, to believe that both Mrs. Saunders and defendant had committed a violation of the laws relating to narcotic drugs. *U. S. v. Walker*, 7 Cir., 1957, 246 F. 2d 519, 525, 526, 527; *Draper v. U. S.* (1959) 358 U.S. 307, 313. In each case arrest preceded the search which was incidental to a lawful arrest. *U. S. v. Guido*, 7 Cir., 1958, F. 2d 1, 4, cert. den. 356 U.S. 950.

Agent Bailey testified further that when he asked Mrs. Saunders where the heroin was, she stated Mrs. Toomer had taken it. Agent Bailey then went to the adjoining room and to the bed on which Mrs. Toomer was sitting and found both the money and the heroin.

We cannot agree that delay in effecting Mrs. Saunders' arrest rendered it illegal. The statute on which the government relies does not require an arrest to be made immediately following the arresting officers' acquisition of knowledge constituting probable cause for arrest. *Daibo v. U. S.*, 5 Cir., 1958, 261 F. 2d 870, 872, cert. den. 359 U.S.

969. According to Heisig's testimony, it was after he had identified himself as a federal narcotics agent and had placed Mrs. Saunders under arrest, that she closed the door, thus subjecting herself to necessary forcible means to make the arrest effective. The agents here gave notice of their authority and purpose, unlike the officers in *Miller* v. *U. S.* (1958), 357 U.S. 301, 313, cited by defendant. Nor can we conclude that the circumstances of this case were such as to impose an affirmative duty on the agents to delay search until a warrant could have been procured. The time element alone, judged retrospectively, may not be used as a measure of the reasonableness of the search. *U. S.* v. *Rabinowitz* (1950) 339 U.S. 56, 65.

Defendant considers the proof of Counts I, II and III to be fatally defective in that the government failed to prove that Dorothy Saunders did not have the requisite written order form for purchase of narcotics.

The government relies on *Chin Gum* v. *U. S.*, 1 Cir., 1945, 149 F. 2d 575, 577, for the principle that it is not incumbent on the government to prove that the purchaser of narcotics charged under Title 26, U. S. C. Section 4705(a), did so without a written order on the form prescribed. The Court there was dealing with Title 26, U. S. C. (Internal Revenue Code) Section 2554, which in the 1939 Code corresponded to our Title 26, U. S. C. Section 4705(a).

In *Taylor* v. *U. S.*, 8 Cir., 1927, 19 F. 2d 813, the Court said (at page 816) that the government having established the sales, the burden was on the defendant to prove that he had paid the special tax; that the government was not required to prove a negative. In *Martinez* v. *U. S.*, 5 Cir., 1928, 25 F. 2d 302, (2nd case) the Court said (at page 303) that the government was not bound to prove a negative when the fact as to whether there was a written order was one peculiarly within the knowledge of the defendant. In *Sauvain* v. *U. S.*, 8 Cir., 1929, 31 F. 2d 732, 733, the Court also held that it was not incumbent on the government to prove that the buyer of the narcotics had no written order. To the same effect is the more recent *U. S.* v. *Sabella*, 2 Cir., 1959, 272 F. 2d 206, 211.

Defendant's reliance on *Blockburger* v. *U. S.* (1932) 284 U.S. 299; *Gore* v *U. S.* (1958) 357 U.S. 386; and *U. S.* v. *Johnson*, 7 Cir., 1956, 235 F. 2d 159, 162; seems misplaced as the cases are distinguished from the case before us. In the above cited cases multi-count indictments were based on a single transaction. In *Blockburger* one sale had been held to give rise to two offenses, stated in two counts: (1) a sale not in pursuance of a written order, and (2) a sale not from or in the original stamped package. The Trial Court had imposed consecutive terms of imprisonment. In order to ascertain whether the accused had committed two offenses or only one, the Supreme Court considered the proof and held that proof of a sale not from or in the original stamped package naturally would not also prove sale not in pursuance of a written order, arising from the same transaction. In *Gore*, one transaction gave rise to three violations. On appeal the legality of the sentence was questioned, as consecutive terms of imprisonment had been imposed. In *Johnson*, it was argued that the defendant could not be consecutively sentenced for purchase and sale of the same narcotics when such purchase and sale constituted a single transaction which had been fragmentized in the indictment. In each case the imposition of the consecutive sentences was affirmed.

In the case before us, the indictment charges three separate sales, each without order. There is no question of pyramided sentences based on a single transaction.

Defendant questions the sufficiency of the evidence adduced at the trial to support the conviction under Count II which alleged the sale on February 16th, and Count IV which alleged unlawful receiving, concealing etc.

At the trial, Agent Bailey testified to meeting Dorothy Saunders on February 11, 1959, driving her from 35th and Prairie Avenue, in Chicago, to 43rd and Drexel Boulevard, where she left the car and entered a drug store.

Dorothy Saunders testified that she had been a narcotics addict, that she had known defendant more than

three years and had seen him several times daily for more than two years. She testified further that on February 11, 1959, she had been introduced to Agent Bailey as "Red", that he had driven her to 43rd and Drexel Boulevard where she had telephoned the defendant; that the telephone was first answered by Bernice Toomer, his girl friend, who lived in the same apartment with defendant, and then by defendant whose voice she knew well.

Agent Bailey testified further that he then drove Mrs. Saunders on February 11, 1959, to 46th and Drexel Boulevard and gave her $75. The serial numbers of the bills had been recorded. Agent Lipshutz testified that he and Bailey had recorded the bill numbers of currency used in transactions on February 11, February 16, February 18 and February 20, 1959. Bailey stated further that the bills had been treated with phosphorescent powder.

Mrs. Saunders testified that she then went to defendant's home, that he opened the apartment door to her; that she told him she wanted half an ounce of heroin, that she gave him the money; that he went to the bedroom and came back with a package which she took to Bailey. Bailey testified that the package contained a white powder which on field test proved to contain a derivative of opium.

Bailey testified to similar transactions on February 16, February 18, and February 20, except that the sums of money used on February 18 and February 20 had been $140, and on February 20, when Mrs. Saunders left the car at 46th and Drexel Boulevard, Bailey had spoken to two other agents and then had gone up to the defendant's apartment; that the defendant's name appeared on the bell for that apartment. He testified that the apartment contained six rooms including two bedrooms, none of which was locked and to all of which anyone in the apartment could have had access. He testified further that he found $160 in a suit coat pocket; that later when defendant had been arrested and brought to the apartment, Bailey and the defendant discussed this coat. Bailey testified:

"He said, 'Was it in the back bedroom?' Or, 'Was it in my bedroom?' I said, 'Yes.' He said, 'Everything back there is mine.'" (App. p. 79)

Bailey testified that he had also found $140 between the sheets on the bed on which Mrs. Toomer had been sitting, along with several packages which proved to contain narcotics. The $140 had reacted positively to an ultra violet lamp test and was the same money Bailey had just given Mrs. Saunders.

Mrs. Saunders testified that on February 16, when she telephoned from 43rd and Drexel Boulevard, she had spoken to Mrs. Toomer, and that when she came to the defendant's apartment, Mrs. Toomer had taken her money and given Mrs. Saunders the package (which Mrs. Saunders later gave to Bailey) as well as additional drugs for Mrs. Saunders' own use. On February 18, Mrs. Saunders had spoken to defendant when she telephoned, had seen defendant in the apartment, had paid him the $140 and had secured from him the package which she gave to Bailey. On February 20, she had again spoken to Mrs. Toomer on the telephone and had seen Mrs. Toomer at the apartment; Mrs. Toomer had started out with the "stuff" when there was a knock at the door, Mrs. Toomer then turned to go back to the bedroom and the door crashed in.

Agent Lipshutz testified that when he was admitted to the defendant's apartment by Agent Heisig on February 20, he participated in a search which disclosed packets containing narcotics in a carpet sweeper in defendant's bedroom. It was stipulated that all these substances in question were narcotics.

Lipshutz testified further that he received $160 and $140 from Agent Bailey, and $500 and $341 from Agent Singer who stated, in defendant's presence, that the $341 was taken from defendant's person and the $500 from a Mr. Howard who was with defendant in defendant's store. Lipshutz had checked the numbers of this currency against his four lists and he had found $30 of the $160, all of the $140, and $60 of the $341 tallied with the lists.

Defendant contends that the sale on February 16, alleged in Count II, was between Mrs. Toomer and Mrs. Saunders; and that evidence is totally lacking to charge defendant with the allegations of Count IV on February 20, 1959. Defendant concedes that when, on trial, a defendant is shown to have or have had possession of a narcotic drug, that possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury. However, defendant asserts that he did not have exclusive possession of his apartment and that he was not even present when the narcotics were found; that Mrs. Toomer had as much possession as he because she also lived in the apartment and paid rent. Defendant had testified that Mrs. Toomer paid rent at the hearing on his motion to suppress evidence. At the trial however, no such evidence was given. Mrs. Saunders' uncontroverted testimony was that Mrs. Toomer was defendant's girl friend who lived with him. Mrs. Saunders testified that she did business with defendant "all of the time before, and every time I took him some money—he could tell how much I wanted because he could tell by the money I had." (App. p. 113) On the 20th, when defendant was not in the apartment, Mrs. Saunders testified that when she got inside the door, she had just enough time to give Mrs. Toomer the money and Mrs. Toomer "started out with the stuff." (App. p. 121)

On appeal the evidence must be viewed in the light most favorable to the government. *U. S.* v. *Delonte*, 7 Cir., 1952, 199 F. 2d 286, 288; *U. S.* v. *Guido*, 7 Cir., 1958, 251 F. 2d 1, 5, cert. den. 356 U.S. 950; *U. S.* v. *Taylor*, 7 Cir., 1959, 266 F. 2d 310, 312, cert. den. 361 U.S. 853.

The jury would be justified in concluding that Mrs. Saunders dealt with Mrs. Toomer solely as a representative and accommodation agent of defendant, and that there was an established pattern of dealing with defendant.

U. S. v. *Landry*, 7 Cir., 1958, 257 F. 2d 425, cited by defendant is easily distinguished on the question of pos-

session. In *Landry*, narcotics owned by Landry were found in the pocket of another who stated that she was keeping them for Landry because if she let him have them, he would use them all at once. Thus in *Landry*, unlike here, control was expressly negatived. On the evidence adduced at the trial, the jury could properly conclude beyond any reasonable doubt that the narcotics in defendant's apartment on February 20, 1959, were in his possession.

We find substantial evidence to support the judgment of conviction.

Defendant lists a number of purported errors in connection with the instructions to the jury. The record clearly shows that defendant failed to comply with Rule 30, Federal Rules of Criminal Procedure:

> "... No party may assign as error any portion of the charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection."

As this Court said in *U. S. v. Furlong*, 7 Cir., 1952, 194 F. 2d 1, 3, cert. den. 343 U.S. 950, an objecting party must state his objection specifically, together with the grounds therefor, to give the Trial Judge an opportunity to make any correction he thinks proper.

Defendant does not dispute this rule, but argues that "plain error" has been committed here which may be noted by this Court under Rule 52(b), Federal Rules of Criminal Procedure:

> "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court."

Defendant characterizes the instructions as "palpably in error and grossly misleading." It is well settled that on review we must consider the instructions as a whole. *U. S. v. DeMarie*, 7 Cir., 1955, 226 F. 2d 783, 787, and other cases therein cited. Careful scrutiny of the charge to the jury as a whole leads us to conclude that the jury could not have been misled as defendant contends and that defendant's substantive rights have not been adversely affected.

Other matters argued by defendant have been considered with care and found to be without merit.

The judgment of the Trial Court is AFFIRMED.

APPENDIX B.

UNITED STATES COURT OF APPEALS
For The Seventh Circuit
Chicago 10, Illinois

Friday, July 22, 1960

Before

Hon. John S. Hastings, Chief Judge

Hon. Elmer J. Schnackenberg, Circuit Judge

Hon. Win G. Knoch, Circuit Judge

No. 12870 United States of America, *Plaintiff-Appellee.* vs. Fred Davis, *Plaintiff-Appellant.*	Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, it is ordered and adjudged by this court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, Affirmed, in accordance with the opinion of the Court filed this day.

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago 10, Illinois

Thursday, September 1, 1960

Before

Hon. John S. Hastings, Chief Judge

Hon. Elmer J. Schnackenberg, Circuit Judge

Hon. Wm G. Knoch, Circuit Judge

No. 12870
UNITED STATES OF AMERICA,
Plaintiff-Appellee.
vs.
FRED DAVIS,
Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that the petition for a rehearing of this cause be, and the same is hereby, DENIED.

APPENDIX C.

STATUTES AND LAWS.

FOURTH AMENDMENT TO THE CONSTITUTION

The right of the People to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause supported by Oath or Affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

RULE 41(c)—SEARCH AND SEIZURE

TITLE 18, U. S. CODE—FEDERAL RULES OF CRIMINAL PROCEDURE

A warrant shall issue only on affidavit sworn to before the judge or commissioner and establishing the grounds for issuing the warrant. If the judge or commissioner is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, he shall issue a warrant identifying the property and naming or describing the person or place to be searched. The warrant shall be directed to a civil officer of the United States authorized to enforce or assist in enforcing any law thereof or to a person so authorized by the President of the United States. It shall state the grounds or probable cause for its issuance and the names of the persons whose affidavits have been taken in support thereof. It shall command the officer to search forthwith the person or place named for the property specified. The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time. It shall designate the district judge or the commissioner to whom it shall be returned.

26 U.S.C., Section 7607. Additional authority for bureau of narcotics and bureau of customs.

The Commissioner, Deputy Commissioner, Assistant to the Commissioner, and agents, of the Bureau of Narcotics of the Department of the Treasury, and officers of the customs (as defined in section 401(1) of the Tariff Act of 1930, as amended; 19 U.S.C., sec. 1401 (1), may—

* * *

(2) make arrests without warrant for violations of any law of the United States relating to narcotic drugs (as defined in section 4731) or marihuana (as defined in section 4761) where the violation is committed in the presence of the person making the arrest or where such person has reasonable grounds to believe that the person to be arrested has committed or is committing such violation.

Chapter 38, Section 657, Illinois Rev. Stat. 1959, (S.B.A. Ed.) Arrests without warrant.

§ 4. An arrest may be made by an officer or by a private person without warrant, for a criminal offense committed or attempted in his presence, and by an officer, when a criminal offense has in fact been committed, and he has reasonable ground for believing that the person to be arrested has committed it.

FEDERAL RULES OF CRIMINAL PROCEDURE.

Title 18 U.S.C

Rule 3. The Complaint.

The complaint is a written statement of the essential facts constituting the offense charged. It shall be made upon oath before a commissioner or other officer empowered to commit persons charged with offenses against the United States.

Rule 4. Warrant or Summons upon Complaint.

(a) Issuance. If it appears from the complaint that there is probable cause to believe that an offense has been committed and that the defendant shall issue to any officer authorized by law to execute it. * * *

Rule 52(b) Plain Error.

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

SECTION 174, TITLE 21, U. S. CODE

Whoever fraudulently or knowingly imports or brings in narcotic drug into the United States . . . Contrary to law, or receives, conceals, buys, sells or in any manner facilitates transportation, concealment or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law . . . Whenever on trial for a violation of this Section, the defendant is shown to have or to have had possession of a narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

SECTION 4705(a) TITLE 26, U. S. CODE

It shall be unlawful for any person to sell, barter, exchange or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged or given, on a form to be issued in blank for that purpose by the Secretary or his delegate.

FILE COPY

Office Supreme Court, U.S.
FILED
NOV 28 1960
JAMES R. BROWNING, Clerk

No. 456

In the Supreme Court of the United States

OCTOBER TERM, 1960

FRED DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General.

MALCOLM RICHARD WILKEY,
Assistant Attorney General.

BEATRICE ROSENBERG,
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Attorneys.

Department of Justice, Washington 25, D.C.

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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 456

FRED DAVIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1–13) is reported at 281 F. 2d 93.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 1960 (Pet. App. 14). A petition for rehearing was denied on September 1, 1960 (Pet. App. 15). The petition for a writ of certiorari was filed on September 30, 1960. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTES INVOLVED

26 U.S.C. 4705(a), 68A Stat. 551, provides:

> ORDER FORMS.
>
> (A) GENERAL REQUIREMENT.
>
> It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate.

21 U.S.C. 174, 70 Stat. 570, provides:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.
>
> Whenever on trial for a violation of this subsection the defendant is shown to have or to have had possession of the narcotic drug,

such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

* * * * * * * *

STATEMENT

Petitioner was convicted in the United States District Court for the Northern District of Illinois on three counts charging three unlawful sales of heroin in violation of 26 U.S.C. 4705(a) (*supra*, p. 2), and a fourth count charging the knowing and unlawful receipt and concealment of heroin after its unlawful importation, in violation of 21 U.S.C. 174 (*supra*, pp. 2–3) (R. 3–5, 215). Petitioner, who had a record of four previous narcotics convictions (R. 217–221), was sentenced to 20 years on each count, the first two to run consecutively and the third and fourth concurrently, for a total of 40 years' imprisonment (R. 221–222). On appeal (R. 223), the conviction was affirmed (Pet. App. 1–14).

Pertinent evidence adduced at the hearing on a motion to suppress evidence, which was denied (R. 59), and at the trial may be summarized as follows:

Agent Bailey, working under cover, arranged to buy narcotics from a Miss Saunders (who testified for the government at the trial). On the evening of February 11 (Count I), Miss Saunders called petitioner and then had Bailey drive her to the vicinity of petitioner's apartment. Bailey gave Miss Saunders $75.00 which (although she did not know it) had been treated with phosphorescent powder and the serial numbers of which had been recorded. Miss Saunders pur-

chased half an ounce of heroin from petitioner in his apartment and delivered the heroin to Bailey (R. 20, 64, 96–98, 112–113, 132–133, 161–162).

On February 16, 1959 (Count II), Bailey followed substantially the same procedure in making a purchase of heroin through Miss Saunders, except that she obtained the heroin at petitioner's apartment from Bernice Toomer, who lived with petitioner (R. 21–24, 38–40, 70–71, 99–101, 113–118, 133, 128, 162).[1] On February 18, 1959 (Count III), Bailey and Miss Saunders followed a procedure similar to that on February 11 (Count I) in making still another purchase of heroin from petitioner (R. 23, 72–74, 101–102, 118–120, 133, 128, 162–163).

On February 20, 1959 (Count IV), Bailey again arranged with Miss Saunders for the purchase of $140 worth of heroin, (R. 23, 26, 75–76). At about 7:30 p.m., agent Heisig, in the company of several other agents, saw Miss Saunders enter petitioner's apartment (R. 30). Thereafter, an unidentified man, presumably an insurance agent, knocked at the door (R. 120, 121, 30). When Miss Saunders answered, Heisig, who had been about to knock, stated that he was a narcotics agent and that she was under arrest. She slammed the door and the agents forced their way into the apartment and effected her arrest (R. 30, 121, 134). Agent Bailey, who had come to the apartment (R. 23, 76), asked Miss Saunders where the heroin was and she replied that Bernice Toomer had taken it. In the back bedroom, where Mrs. Toomer

[1] The reference at R. 21 to the 17th of February is an error.

was sitting on the bed, Bailey threw back the cover and found the $140 in official advance funds and nine small manila envelopes, found to contain heroin (R. 24, 30–31, 77, 163–164). The agents found other heroin in a sweeper in petitioner's apartment (R. 135–137, 164–165).

After the seizure of the heroin, two agents were dispatched to petitioner's grocery store, where they arrested him without a warrant. They took $341 from petitioner and $500 from his partner, Mr. Howard (R. 31, 35, 78, 141, 142). Petitioner was taken to his apartment, where agent Bailey meanwhile had found $160 in a coat. When he was told that the coat had been found in his bedroom, petitioner admitted, "Everything back there is mine" (R. 31–32, 78, 79). In checking the serial numbers of the bills with his four marked money lists, agent Lipshutz found that all the $140 found in the bed, $30 of the $160 found in the coat, and $60 of the $341 taken from petitioner corresponded with the lists (R. 143, 146–147, 150–151).

DISCUSSION

1. In its charge to the jury, the trial court, in the course of its instructions on reasonable doubt and other general matters, specifically told the jury, with respect to the first three counts, that if, "from the evidence or lack of evidence, you have reasonable doubt as to whether or not the defendant sold a narcotic drug to Dorothy Saunders on February 11, 1959, February 16, 1959, and February 18, 1959, then, you should find the defendant not guilty" (R. 194).

The court then read, practically verbatim, the four counts of the indictment, including the references to 26 U.S.C. 4705(a) (Counts I, II, and III) and 21 U.S.C. 174 (Count IV) (compare R. 196–198 with R. 3–5). Following this, however, the court read as applicable to Counts I, II, and III, not 26 U.S.C. 4705(a), under which these counts were actually laid, but 21 U.S.C. 174, dealing with receipt and concealment after unlawful importation, which was the basis of the charge in Count IV involving the heroin found in petitioner's apartment on February 20, 1959. And in this connection the court read the presumption created by Section 174 (but not by Section 4705 (a)) to the effect that, where the defendant is shown to have had possession of a narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury (R. 198). In explaining the meaning of possession, the court said that it could mean actual, manual possession, "or it may also mean constructive possession, that is, where the goods are shown to have been under the control of the person charged, although they were in the actual physical possession of another" (R. 198). The court then adverted again to Count IV, instructing the jury that, if they found beyond a reasonable doubt that petitioner had possession of the narcotics as charged in that count, "you are required to find him guilty under Count IV, unless he explains such possession to your satisfaction" (R. 199).

Neither counsel called the court's attention to its error in linking Counts I, II, and III with Section 174.

The court of appeals was of the view that, since it was evident that the trial court would have corrected the error if it had been called to its attention, petitioner was precluded from raising the issue under Rule 30, F.R. Crim. P., and that, in the light of the charge as a whole, the jury could not have been misled. It accordingly held that there was no plain error affecting substantial rights which it would notice under Rule 52(b) (Pet. App. 12–13).

We agree that the mere reading of the wrong statute would not necessarily be plain error, particularly in a case such as this where the sales were proved through the testimony of the purchaser, Miss Saunders. The difficulty we have with the charge as a whole, however, is that the court told the jury that there was applicable to Counts I, II, and III the presumption allowed by 21 U.S.C. 174, whereas the statute under which these counts were laid, 26 U.S.C. 4705(a), allows no such presumption and it could not properly play any part with respect to those offenses. It is impossible to assess the weight given to the presumption by the jury, particularly since, as to the Count II, Miss Saunders testified that she made the actual purchase from Mrs. Toomer. Under these circumstances we believe that, despite the clear evidence of petitioner's guilt, the error in the instructions was plain error within the meaning of Rule 52 (b). See *Bihn* v. *United States*, 328 U.S. 633; *Bollenbach* v. *United States*, 326 U.S. 607.

2. This error does not affect Count IV, which was based on the receipt and concealment, in violation of 21 U.S.C. 174, of the heroin found in petitioner's apartment on February 20, 1959. As to this count, the question raised is the validity of the search of petitioner's apartment incident to the arrest of Miss Saunders there. The court below properly found the search to be a valid incident of that arrest.

Petitioner complains that the agents did not have a warrant for the arrest of Miss Saunders. Under 26 U.S.C. 7607, however, federal narcotics agents have authority to arrest without a warrant on reasonable ground to believe that a person has committed an offense. The agents' dealings with Miss Saunders furnished ample probable cause for her arrest.

The agents also knew that petitioner's apartment was the source of the narcotics Miss Saunders procured for agent Bailey, and that, shortly before they entered the apartment on February 20, she had gone there to get narcotics. It was she who opened the door, and it was she who tried to bar entry when agent Heisig told her she was under arrest. She also was the one who told the agents, when they asked where the heroin was, that Mrs. Toomer had it. Under these circumstances, the agents had the right to search the apartment as an incident of the arrest of Miss Saunders. *Clifton* v. *United States*, 224 F. 2d 329 (C.A. 4), certiorari denied, 350 U.S. 894. In that case, where, with respect to liquor violations, the facts were quite similar, the Fourth Circuit said, pp. 0–331:

> If a person allows a felon to use his home for illegal purposes, then evidence obtained on a search made after arrest of the felon is admissible against the owner of the home. * * * It is not necessary that the owner be the party arrested in such a case.

See also *Marron* v. *United States*, 275 U.S. 192, where books and records seized as an incident of the arrest of an employe were admitted against the owner who was not present at the time of arrest.

The charge in Count IV was thus amply proved by the evidence of petitioner's possession of narcotics which were validly seized in his apartment. The conviction on that count should be sustained.

CONCLUSION

For the reasons discussed above, we suggest that an appropriate disposition of the case would be to grant certiorari as to Counts I, II, and III, reverse the judgment with respect to those counts, and remand them to the district court for a new trial. In other respects, we submit that the petition for a writ of certiorari should be denied.

Respectfully submitted.

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On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit.

REPLY MEMORANDUM FOR PETITIONER.

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FOREWORD.

The Government, with commendable candor, has confessed error as to the judgment on Counts 1, 2 and 3 of the indictment. It suggests, however, that as to the judgment on Count 4, the petition for writ of certiorari should be denied. Under this count petitioner was sentenced to imprisonment for 20 years. (R. 222).

REPLY.

In opposing review by this Court of a part of the judgment referred to above, the Government has ignored completely Question Presented Number 1 (Pet. 2) and Reasons for Granting the Writ on this point (Pet. 10-11).

By the highly prejudicial remark of the Court therein set forth, the defendant was completely deprived of all the benefits of fundamental instructions concerning the presumption of innocence, the burden of proof, the credibility of witnesses, reasonable doubt, and the failure of the defendant to testify in his own behalf.

The Court of Appeals evaded this fundamental question so important to the proper administration of criminal trials under our system. The entire charge was completely destroyed by the erroneous and prejudicial reference by the trial judge to the instructions as "rubber stamp".

This error, compounded as it was by the erroneous instructions upon which error has been confessed, conclusively establishes that the general verdict "guilty as charged in the indictment" (R. 214-215) was arrived at by a completely confused and misled jury.

The jury was not instructed to consider the guilt or innocence of the defendant as to each separate count of the indictment (R. 192-199. but rather, "whether the defendant is or is not guilty as charged in the indictment." (R. 199), (Pet 52).

Concerning the Court's charge, the Government concedes that the errors thereof infected the entire proceeding in stating, "The difficulty we have with the charge as a whole" and "It is impossible to assess the weight given to the presumption by the jury." (Gov. Br. 7).

2. The Government gratuitously states that as to Count 4 the question raised is the validity of the search of petitioner's apartment incident to the arrest of Miss Saunders there. (Gov. Br. 8). This assertion overlooks Question Presented Number 7 (Pet. 4), concerning the arrest and search of the defendant at his store several miles from the apartment. The evidence thereby obtained was a vital part of the Government's case. (R. 141-142, 150-151). The Government ignores this point and petitioner's discussion thereof at Pet. 21. The statement of facts appears at Pet. 6-8.

3. The Government in misapprehending Question Presented Number 8 (Pet. 4), states that "Petitioner complains that the agents did not have a warrant for the arrest of Miss Saunders", (Gov. Br. 8). A mere reading of the Question Presented and Point *IV* of Reasons for Granting the Writ (Pet. 16), will make the Government's understatement quite clear.

The distinction between the case at bar and *Clifton* v. *United States*, 224 F. 2d 329 (C.A. 4), cited by the Government (Gov. Br. 8), is apparent from a comparison of the facts in the two cases. In *Clifton*, the Court said, at page 330:

> "The investigators had just purchased untaxed whiskey from Padgett after *watching him obtain it* from the room which they later searched. The search *did not extend beyond the room* from which the whiskey had come, and no force was used. Under these circumstances, we feel that the search was reasonable." (Emphasis supplied).

Applicable to the case at bar is the statement of the Court in *Clifton* (p. 330) "Of course, as we pointed out in

Henderson v. *United States*, 4 Cir., 12 F.2d 528, 51 A.L.R. 420, the arrest must be more than a mere sham and not merely an excuse for the search."

In *Marron* v. *United States*, 275 U.S. 192, (Gov. Br. 9), a place of business where various offenses against the National Prohibition Act were being committed was involved. Upon entry to the premises to serve a warrant, the agents observed violations of law being committed. This Court approved the arrest and search and seizure upon that basis.

Here, a private dwelling is involved. No warrant of arrest or search was in existence. The original entry was unlawful. Here there was an arrest incident to a search rather than a search incident to an arrest. The search was a night-time search made upon the pretext of the arrest of another person. Here was a general exploratory search of the entire apartment. No crime was committed in the presence of the arresting agents and no emergency was shown to exist.

We urge that the case cited in the petition herein (Pet. 16-21) apply to the factual situation of this case more aptly than those cited by the Government.

CONCLUSION.

We respectfully urge that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Attorneys for Petitioner.